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Supreme Court, U.S.
FILED
MAY 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MIDWEST COMMUNICATIONS, INC.,

Petitioner,

v.

MINNESOTA TWINS, INC.; NORTHSTAR HOCKEY PARTNERSHIP; TWINSTAR ENTERPRISES, A GENERAL PARTNERSHIP; MINNESOTA SUBSCRIPTION TELEVISION, INC., D/B/A SPECTRUM; AND SPORTS CHANNEL, A MINNESOTA JOINT VENTURE;

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

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May 19, 1986

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Introduction	1
Argument	2
Conclusion [1]	8

TABLE OF AUTHORITIES

Cases:	Page
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	4, 5, 7
Monfort of Colorado, Inc. v. Cargill, Inc., 761 F.2d 570 (10th Cir. 1985), *cert. granted*, 106 S.Ct. 784 (1986) (No. 85-473)	4, 5
Tim W. Koerner & Assoc., Inc. v. Aspen Labs, Inc., 492 F. Supp. 294 (S.D. Tex. 1980), *affirmed*, 683 F.2d 416 (5th Cir. 1982)	4, 5
Statutes:	
Clayton Act, §16, 15 U.S.C. §26 (1982)	4, 5

[1] Pursuant to Supreme Court Rule 28.1, petitioner, Midwest Communications, Inc. (now known as Midwest Communications Operating Company), states that its parent company is MTC Properties, Inc. (now known as Midwest Communications, Inc.), and that it has no subsidiaries (excluding wholly owned subsidiaries) or affiliates, except that one subsidiary has an interest in Satellite Music Network, Inc. and another subsidiary is a partner in Satellite Radio Network Partnership.

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INTRODUCTION

The Joint Brief for Respondents in Opposition ("Joint Brief"), in its own formulation of the Questions Presented at Page i, concedes that this case raises important and substantial antitrust questions. The Joint Brief, however, seeks to convince the Court that this is not the case in which to decide

those questions. To this end, the Joint Brief misstates certain facts and principles.

The purpose of this Reply Brief is to set the record straight. This is the case in which to decide the questions presented.

ARGUMENT

1. Respondents' essential (but erroneous) description of the case is that their conspiracy consisted only of a *single* transaction in 1982 in which Midwest Communications, Inc. ("WCCO") at one point *willingly* bid for both the telecast rights of the Minnesota Twins, Inc. baseball team ("Twins") and the Northstar Hockey Partnership hockey team ("North Stars") and that Spectrum ultimately *outbid* WCCO. (Joint Brief, pp. 2-4).

   WCCO's reply to this contention is as follows:

   a. At page 16 of the Joint Brief respondents concede that their illegal pooling arrangement is not simply for a single transaction but exists for 20 years until the year 2002.

   b. WCCO never willingly bid for a package of both Twins and North Stars rights. At one time, it bid for both Twins and North Stars rights because it was *told* to do so by the Twins and North Stars as part of the tying violation. (See Testimony of James Rupp, Vol. I, pp. 6, 63, 8th A 1140-1141; Vol. III, p. 197, 8th A 1150). Then when WCCO had an opportunity to bid for Twins rights only under the Midwest Federal right of first refusal contract, it did so. The single most important reason for the rejection of this later bid was the fact that WCCO did not also bid to purchase North Stars' pay telecast rights. (Pl. Exh. 146 at p. 2, 8th A 570). Re-

spondents made the argument to the jury that WCCO willingly bid for both Twins and North Stars rights. The jury rejected that construction of the true facts and found unlawful tying. (Special Verdict, Questions 6, 7, 8, and 11—Petition A-48 - 50).

c. In any event, whether Spectrum outbid WCCO is irrelevant. WCCO was forced to participate in a tainted competition where it was not allowed to compete separately for Twins and North Stars rights. Since the process itself was tainted by antitrust pooling and tying violations, WCCO's injury in failing to obtain Twins telecast rights is an "antitrust" injury.

d. WCCO should not be forced now to make a new offer to purchase from a continuing illegal conspiracy. What WCCO seeks in this case is injunctive relief so that it will not be compelled to deal with a pooling arrangement that a jury has already found is a conspiracy among competitors in unreasonable restraint of trade. The alleged failure of WCCO to date to make a new purchase offer after Spectrum's recent demise emphasizes the need for relief rather than rendering the case moot.[2]

2. Respondents attempt six other arguments in an effort to muddy the record. All are readily countered.

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[2] Similarly, this case is not mooted by WCCO's recent accommodation with the Twins to permit a transfer in the Twins' ownership. WCCO expressly reserved its claim for injunctive relief against the Twins. (Joint Brief, pages A-11 - 12). Further, WCCO expressly reserved all damages and injunctive claims against the North Stars. (Joint Brief, pages A-11 - 12). The North Stars are jointly and severally liable for damages for all injury to WCCO.

a. Respondents raise questions about WCCO's substantive antitrust proof. These arguments were expressly rejected by the District Court. The Eighth Circuit expressly did *not* reverse the District Court on these points, and the jury findings of violation are wholly intact. For purposes of this Petition, respondents' antitrust violations are given.

b. Respondents say there is no conflict in the Circuits regarding the applicability of the "antitrust injury" requirement set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) to injunctive claims under Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982). In making that contention, the respondents fail to consider properly the opinions in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), *cert. granted* 106 S.Ct. 784 (1986) (No. 85-473) and *Tim W. Koerner & Assoc. v. Aspen Labs, Inc.*, 492 F.Supp. 294 (S.D. Tex. 1980), *aff'd* 683 F.2d 416 (5th Cir. 1982). The courts in both of those cases applied a proximate cause test to injunctive claims, requiring only that the plaintiff show that threatened injury was proximately caused by the violation without reference to "antitrust injury".

These holdings have their basis in *Brunswick*. This Court in *Brunswick* expressly rejected the notion that to recover *damages* a plaintiff had to show only a violation and injury proximately caused by the violation. This Court instead found that, to recover *damages*, a plaintiff has to "prove more than injury causally linked to an illegal presence in the market." 429 U.S. at 489. This Court in *Brunswick* nevertheless permitted the plaintiffs to proceed with their injunctive claim based

on that theory of proof. As the Court of Appeals for the Tenth Circuit stated in *Monfort*:

> In a section 16 case, *Brunswick* mandates only an inquiry into the causal connection between the threatened injury and the putative antitrust violation . . . The Supreme Court has said that this causation inquiry is like proximate cause analysis. See Blue Shield, 457 U.S. at 477, 102 S.Ct. at 2547; Associated General Contractors, 459 U.S. at 535-36, 103 S.Ct. at 907-08.

761 F.2d at 574.

Similarly, in *Tim W. Koerner & Assoc.*, the District Court first expressly distinguished between a proximate cause requirement and an antitrust injury requirement. 492 F.Supp. at 300. The court then held that both elements were required for standing under Section 4 of the Clayton Act, but only the proximate cause part of the requirement was required for standing under Section 16. For injunctive cases under Section 16, the court held:

> The pivotal issue for standing under section 16 is proximate cause. The Plaintiff must demonstrate that he is threatened with loss or injury proximately resulting from the antitrust violation. Id. The analysis of proximate cause under section 4, as set forth above, [as distinguished from the analysis of antitrust injury under *Brunswick*] is also applicable to section 16.

492 F.Supp. at 300-301.

These rulings stand in direct conflict with the opinion of the Eighth Circuit in this matter.

c. Respondents say that WCCO was recently able to obtain Twins radio rights. Of course, the TwinStar pooling contract only covered *telecast* rights. Indeed, the jury defined the relevant market in this case solely in terms of telecast rights. (Special Verdict Question 1—Petition A-47). The fact that WCCO was able to separately compete to purchase radio rights is hardly an excuse for TwinStar. Radio rights are not a part of TwinStar but, rather, are sold by the Twins without any involvement of the North Stars.

d. Respondents say that WCCO has driven Spectrum from the market with this litigation. (Joint Brief, page 14, footnote 5). To the contrary, Spectrum remained in business throughout the litigation and, of course, in March 1984 the District Court removed the injunction against the teams which prohibited their tying. Spectrum did not cease its broadcasting of pay TV sports until the fall of 1985. (Joint Brief, pages 5, 6).

Further, when WCCO filed this lawsuit, the teams and Spectrum asserted a series of counterclaims against WCCO. In response to these counterclaims, the jury expressly found that WCCO did not interfere with the business relations of or cause damage to the North Stars, Spectrum, the Twins, Sports Channel, or TwinStar. (Special Verdict Questions 20, 22, 24, 26, and 28—Petition, pages A-51 - A-53).

e. Respondents say the District Court never found any threatened injury to WCCO by respondents' antitrust violation. To the contrary, the District Court by definition found there *was* a threat when it initially granted WCCO injunctive relief in September, 1983. There is no deficiency in the record on this point. The problem

is that the District Court later misapplied this Court's decision in *Brunswick* to the claims for injunctive relief. That misapplication should be reviewed.

f. Respondents say this case will not have general applicability because it comes to the Court following trial and is fact specific. To the contrary, this is the case where the questions presented should be addressed, because a jury on a fully developed record has already found a price-fixing and tying conspiracy among horizontal competitors in the sale of telecast rights. The Court therefore need engage in no speculation regarding the evils of the arrangement. Professional sports teams and broadcast entities around the country are looking to the outcome of this case to see whether narrow application of standing rules is going to protect the formation of such conspiracies concerning telecast rights.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

Dated: May 19, 1986.

Respectfully submitted,

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